JUDICIARY SUBCOMMITTEE ON CRIMINAL LAW

Senator Jerry Moran, Chairman

March 18, 1992

HB 3012 - collecting blood and saliva samples from juvenile sex offenders.

PROPONENTS

Helen Stephens, Kansas Police Officers Association
Melanie Jack, Kansas Bureau of Investigation (ATTACHMENT 1)
James Clark, Kansas County and District Attorneys Association (ATTACHMENT 2)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATION: recommended favorable for passage.

SB 628 - repealing the certified public accountant's client communication privilege.

PROPONENTS

James Clark, Kansas County and District Attorneys Association (ATTACHMENT 3)
David Lord, Securities Commission of Kansas (ATTACHMENTs 4 and 5)

OPPONENTS

T. c. Anderson, Kansas Society of Certified Public Accountants

SUBCOMMITTEE RECOMMENDATION: amend implementation date to publication in the Kansas Register; recommend favorable for passage as amended.

SB 135 - organized criminal activity act.
SB 297 - engaging in continuing criminal enterprise.
SB 447 - enacting the Kansas criminally influenced and corrupt organizations act.
SB 537- enacting the organized criminal activity act.

PROPONENTS

appeared at another time

OPPONENTS

American Civil Liberties Union (ATTACHMENTs 4, 5, 6 and 7)
Kenneth McNeill, ABATE of Kansas (ATTACHMENT 8)

SUBCOMMITTEE RECOMMENDATION: action deferred to a later date.

SB 665 - creating the crime of stalking. (CONTINUED FROM MARCH 3, 1992)

PROPONENTS

Dona Nordstrom, Topeka, representing College Hill Association (ATTACHMENT 9)
Edwin Van Petten, Office of the Attorney General (ATTACHMENTs 10 and 11)
Susan Duffey, Topeka College Hill resident

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATION: hold for further amendatory language.

Attachment I

KANSAS BUREAU OF INVESTIGATION

DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS
1620 TYLER
TOPEKA, KANSAS 66612-1837
(913) 232-6000

JAMES G. MALSON
DIRECTOR

ROBERT T. STEPHAN
ATTORNEY GENERAL

TESTIMONY
MELANIE S. JACK, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
BEFORE THE SENATE JUDICIARY COMMITTEE
IN SUPPORT OF HOUSE BILL 3012
MARCH 17, 1992

Mr. Chairman and Members of the Committee:

I appear today on behalf of the Kansas Bureau of Investigation in support of House Bill 3012. This bill would expand the DNA Data Bank to include juvenile offenders adjudicated for the predicate offenses already in place for adults under K.S.A. 21-2511, i.e. murder and the various felony sex offenses.

We feel this expansion would be appropriate as juvenile offenders commit approximately 20% of the sex offenses, according to KBI statistics. Due to the high recidivist rate among sex offenders, coupled with the fact these particular offenders are younger, the chances of their being involved in future assaults are unfortunately quite high. Further, juveniles generally spend less actual time incapacitated in institutions than adults. As such, they are more likely in the near future to be out among the general population. Unfortunately, a certain number will be repeat offenders and having their DNA profiles in our Data Bank will hopefully help us identify those offenders and facilitate their apprehension and conviction.

There will, of course, be additional costs if the DNA Data Bank is expanded to include juvenile offenders. In 1991, 142 juveniles were

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adjudicated under the predicate classifications. The KBI has prepared a fiscal note to expand the Data Bank to include juveniles. The cost would be betweeen $7,500 and $10,000 per year, depending on collection options.

Finally, I would like to suggest a minor amendment to clean up a question that the Department of Corrections (DOC) raised. During initial implementation, the DOC questioned whether persons currently on parole for the predicate offenses were covered. We have agreed and proceeded on the interpretation that they are subject to sampling and have had no problems. However, it is my understanding that the DOC would like this expressly spelled out. Therefore, I would ask this committee to amend HB 3012 by adding "K.S.A. 22-3717" the statute dealing with parole, after K.S.A. 21-4603 in line 36, page 1.

I would be happy to stand for questions.

#070

attachment –.

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Wade Dixon, Vice-President
John Gillett, Sec.-Treasurer
Rod Symmonds, Past President

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EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE • CLE ADMINISTRATOR, DIANA C. STAFFORD

Testimony in Support of

HOUSE BILL NO. 3012

Presented to the Senate Judiciary Criminal Subcommittee

The Kansas County and District Attorneys Association appears in support of House Bill No. 3012.

Briefly, HB 3012 simply adds authority to expand the DNA sample pool to include juvenile offenders. As this population has generally gone through puberty, and is highly energetic, it is likely that a significant portion of juvenile offenders commit, or are likely to commit, sex crimes. Including such offenders in the DNA data base is is both a logical and efficient extension of the data base.

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Attachment 2

Attachment III

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Testimony in Support of

SENATE BILL NO. 628

Presented to the Senate Judiciary Subcommittee on Criminal Law

The Kansas County and District Attorneys Association requested SB 628, and appears in its support. Our Association requested a similar bill several years ago, after an investigation by the Shawnee County District Attorney's office was hampered by the broad protection of records and communications with certified public accountants. The privilege given to communications with CPA's is greater than that given priests, attorneys or spouses. While this may be a subconscious reflection on the relative importance given to such communications, it is simply too broad for the current climate of white collar crime. Our previous effort met with no success, and we were given the old axiom "If it ain't broke, don't fix it." Well, it appears that while things may not be entirely broke, there at least needs to be some preventive maintenance performed.

A compromise proposal has been agreed upon by the Securities Commissioner and the Society of Certified Public Accountants. While we have some concerns over the fact that CPA's have a much more extensive privilege, we defer to the compromise agreement. It does allow prosecutors greater latitude in investigations of white collar crime.

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The Office of the Kansas Securities Commissioner is requesting a modification of present K.S.A. 1-401. This statute is known as the accountant-client privilege for the state of Kansas.

As the statute is presently written it is an extremely broad privilege. The Attorney General has given an opinion regarding this statute in Opinion No. 88-70. This was in response to an inquiry by Representative Snowbarger. In this opinion it is stated ..."the statutorily-created privilege is absolute, subject only to the limitations imposed by the statute itself." The present exceptions are only situations when the communication is material to the defense of an action against the CPA and where it is material to a peer review against the accountant.

An example of the problems caused by this broad privilege is demonstrated during recent KPERS investigations by our agency. During this investigation the facts developed such that we needed to examine the financial records of a securities debtor of KPERS. The accountant had these records in his possession. The accountant was willing to provide the records to us for review, however, he felt compelled to raise the privilege. At this point we examined the language of the present statute creating the accountant-client privilege and agreed with the accountant that such records were not available to us even through the use of a subpoena.

Such a restriction severely hampers a competent investigation to determine whether or not action is appropriate for this agency to properly enforce the Securities Act.

It was discussed that a search warrant could have been issued to acquired the records we needed. However, a search warrant should only be sought when criminal action is contemplated. Many times we may be looking merely at administrative remedies. In addition, the issuance of a search warrant is much more intrusive than response to a subpoena.

I have reviewed the statutes of all 50 states and determined that there are 26 states that do not provide for any accountant-client privilege. This includes such states as California, New York, Nebraska, Oklahoma, Delaware and Ohio. The remaining 24 states can be divided into three groups as to the manner in which the statutes are drafted. Fifteen provide some type of exemption to the general privilege. Most of these exemptions include criminal and bankruptcy cases or situations where a subpoena has been issued. Six states have statutes similar to Kansas which provide exemptions only when

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the accountant is involved. Two states do not appear to provide any exception to the privilege.

In an effort to retain a general privilege for the accountant-client relationship and yet provide access to vital records needed by the state to properly perform its regulatory and law enforcement functions, we propose a modification of the existing statute. We suggest the language presented today.

Unless there is some modification, any person or company anticipating investigation need only place his or its records in the custody of their accountant and such records become shielded from examination by any enforcement agency and from being subject to subpoena and use at trial.

Surely the legislature does not desire this result. It is a recognized principle for the creation of any privilege that the benefits of the privilege must out weigh the injury that would inure to the effective administration of justice. It is our position that as the statute presently exists, the public injury to effective administration of justice far out weighs any benefit to the accountant's relationship with his client.

1-401. Certified public accountants; ownership of working papers; client communications, privileged, exception; availability of documents and information for peer reviews and board investigations. (a) Except as otherwise provided in this section, all statements, records, schedules and memoranda, commonly known as working papers, made by a certified public accountant, or by any employee of a certified public accountant, incident to, or in the course of professional service to clients by such certified public accountant, except reports delivered to a client by such certified public accountant, shall be and remain the property of such certified public accountant in the absence of a written agreement between the certified public accountant and the client to the contrary.

(b) No certified public accountant shall be examined through judicial process or proceedings without the consent of the client as to any communication made by the client to the certified public accountant in person or through the media of books of account and financial records, or as to advice, reports or working papers given or made thereon in the course of professional employment, nor shall a secretary, stenographer, clerk or assistant of a certified public accountant be examined without the consent of the client concerned, concerning any fact the knowledge of which any such person has acquired in such capacity or relationship with the certified public accountant. This privilege shall exist ~~in all cases except~~ when any such communication is material to the defense of an action against a certified public accountant and as otherwise provided by this section.

[Inserted after "accountant.":] Provided, however, this section shall not be construed as limiting the authority of this state or of the United States or any agency of this state or of the United States to subpoena books of account, financial records, reports or working papers, or other documents and use such information in connection with any investigation, public hearing, or court proceeding.

[Inserted after "shall":] not

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(c) Nothing in subsection (a) shall prohibit a certified public accountant, or any employee of a certified public accountant, from disclosing any data to any other certified public accountant, or anyone employed by a certified public accountant in connection with peer reviews of such certified public accountant's accounting and auditing practice. Nothing in subsection (a) shall prohibit the board of accountancy from securing working papers in connection with any investigation authorized under law. Nothing in subsection (b) shall prohibit a certified public accountant or anyone employed by a certified public accountant from disclosing any data to any other certified public accountant or anyone employed by a certified public accountant in connection with peer reviews of such certified public accountant's accounting and auditing practice nor shall such disclosure waive the privilege. Persons conducting such peer reviews shall be subject to the same duty of confidentiality in regard to such data as is applicable to certified public accountants under this section.

(d) As used in this section, "certified public accountant" means a person who holds a permit from the board of accountancy to engage in practice as a certified public accountant in this state.

History: L. 1981, ch. 1, § 1; July 1.

PATRICIA R. HACKNEY
ATTORNEY AT LAW
1012 PENNSYLVANIA STREET
LAWRENCE, KANSAS 66044

(913) 843-2501

February 3, 1992

Sen. Wint Winter, Chair
Senate Judiciary Committee
Statehouse
Topeka, KS 66612

Dear Senator Winter:

Enclosed is testimony from the ACLU on Senate Bills 135, 297, and 447. It is our understanding that hearings are being held on these bills today (Monday). Since we are unable to present this testimony in person, we hope it can be distributed to the Committee, and made part of the record.

This testimony was prepared by a Topeka attorney. But if there are any questions or comments on this testimony, please contact Carla Dugger, Assistant Director of ACLU, or Dick Kurtenbach, Director of the ACLU at ACLU, 201 Wyandotte, Suite 209, Kansas City, MO. 64105; (816) 421-4449. Thank you for your assistance in this matter.

Sincerely,

Patricia Hackney
ACLU Legislative Chair

Encl.

Subject referred to Subcommittee on Criminal Law.
Hearings scheduled for March 4, 1992

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Attachment 4A 1/1

TESTIMONY PRESENTED BY THE AMERICAN CIVIL LIBERTIES UNION BEFORE THE SENATE JUDICIARY COMMITTEE IN REFERENCE TO SENATE BILL 135

January 31, 1992

Senate Bill 135 is a poorly written and difficult to understand piece of legislation.

Section 1(a), which is the definition of "combination", is written so broadly that any activity involving three or more persons is included. It does not even require that these people know each other. Based on this definition, Section 2(a) then defines three types of unlawful conduct. Because of the way it is written, Section 2(a) makes it illegal for any person to participate in a group activity. It is not even necessary for this activity to be illegal; in fact, the activities of this Committee would appear to be included in the conduct prohibited by the first sentence of Section 2(a). For this reason, it is impossible to determine what the prohibited activity is intended to be.

Section 2(d) makes violation of this act at least a C felony. This leads to some absurd consequences; for example, the crime of simple assault, which is a Class C misdemeanor punishable by 30 days in jail, can also become a Class C felony punishable by a maximum of 5 to 20 years in prison, when committed by three or more people. Once again, because of the way that Section 2(a) is written, each member of this Committee would theoretically be committing a Class C felony simply by participating in the activities of this committee.

For the foregoing reasons, the ACLU has two primary objections to this bill. First, the bill is overbroad and encompasses behavior that the drafters could not have intended to declare to be criminal. Second, the provisions of this bill are incompatible with the sentencing policies developed by the Sentencing Commission.

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TESTIMONY PRESENTED BY THE AMERICAN CIVIL LIBERTIES UNION BEFORE THE SENATE JUDICIARY COMMITTEE IN REFERENCE TO SENATE BILL 297

January 31, 1992

In light of the passage of Senate Bill 479 (Sentencing Guidelines Bill), Senate Bill 297 becomes an unnecessary and inappropriate addition to the criminal code.

All elements contained in Section 1(a) which define a continuing criminal enterprise are already contained in Senate Bill 479 in new Section 17 as aggravating factors applicable to drug crimes which allow for an upward departure from the presumptive sentence. The provisions of Section 1(b) which deal with enhanced punishment for subsequent violations of this act are also already dealt with under Senate Bill 479 as factors affecting the criminal history score. A greater criminal history score will in itself result in a longer sentence.

Because Senate Bill 297 merely restates elements of Senate Bill 479, it is an unnecessary addition to the Kansas criminal code.

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TESTIMONY PRESENTED BY THE AMERICAN CIVIL LIBERTIES UNION BEFORE THE SENATE JUDICIARY COMMITTEE IN REFERENCE TO SENATE BILL 447

January 31, 1992

The ACLU's main objection to this proposed legislation is that the bill attempts to minimize the due process required before imposition of the criminal sanctions that it establishes. The bill does not make it clear that a person must be convicted of a crime before his or her property is subject to seizure, forfeiture, and sale. In fact, the bill provides even fewer due process protections in conjunction with the imposition of sanctions that appear criminal in nature than are normally associated with purely civil proceedings.

The ACLU's opposition to this bill is therefore based on the fact that it appears to provide for the potentially unconstitutional deprivation of a person's property.

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Chairman - FYI

TESTIMONY PRESENTED TO
KANSAS
SENATE JUDICIARY SUBCOMMITTEE
SB 447
4 MARCH 1992

TESTIMONY PREPARED BY
AND
PRESENTED BY
KENNETH R. McNEILL

Criminal Law Subcommittee
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Attachment 8 1/2

testimony in opposition to senate bill 447

Mr. Chairman, members of this Subcommittee. I here in opposition to Senate Bill 447. We do not object to the purpose of this bill but we are opposed to any bill that increases the power of the state over the people.

The seventh amendment of the Constitution of the state of Kansas says " No Mans property shall be forfeited for any crime." it is a short amendment but it does not leave a lot of doubt about what it means. This bill will do what is forbidden by that amendment.

This bill states that it is to be liberally construed to achieve its remedial purpose. I have read this bill carefully and can find nothing in it that will limit the power this gives to the law enforcement agencies. We believe this bill to be a serious threat to the freedoms enjoyed by the people of this state. We believe that if this bill becomes law as it is, that as with the federal RICO law it will be used for purposes that you never intended.

If at sometime in the future a helmet bill is passed I have no reason to believe that Abate and the other motorcycle cycle rights organizations will not organize helmet protest runs as we did last time there was a helmet law. Under this law "any property used in of course of, intended for use... in violation of this act" can be confiscated. In a helmet protest helmets are not worn by the participates. This will be against the law. Under this bill organizing a helmet protest will be conspiracy and all of the money and property of this and all the other motorcycle rights organizations will be subject to forfeiture. Our objection is not to the fact that we will be subject to criminal prosecution but to the confiscation of property.

We also object to Sec. 13 that says you can be held in contempt of court if you refuse to testify and supply records "not withstanding such person's refusal to do so on the basis of privilege against self-incrimination". We beleive that the Founding Fathers of this country and State knew what they were doing when that wrote the Constitutions of this Country and State.

This is a bad bill and will be a worse law.

We ask that you do not pass this bill.

Thank you
Kenneth R. McNeill

Abate of Kansas

Dona Nordstrom

1312 College Avenue
Topeka, Kansas 66604

Re: Senate Bill No. 665
Criminal Law Subcommittee

I am the Crime Watch Representative on the Executive Board of the College Hill Association in Topeka.

Our turn of the century neighborhood is directly north of Washburn University. Due to the commitment of neighbors in our association the area has retained its historical heritage within the central city and continues to be a solid, dignified community.

Unfortunately, it has been brought to my attention that women who walk and jog in our area have been stalked during the normal course of their exercise routine. The individual will follow women in his vehicle or on foot for no legitimate purpose - circling city blocks he appears at times from "out of the blue", or he will park in his car within close proximity of their home and just sit - waiting to annoy and alarm his victims. These actions have occured on more than one occasion to a number of women. Reasonable people who now feal reasonable fear for their own personal safety and that of their families, because a stalker has become so familiar and knowledgeable of their daily activities.

In the course of my volunteer work for the neighborhood association I have come in contact with other women in the city who have been stalked by this individual and most regrettably a recent incident involved indecent exposure by this stalker.

It is my understanding there are at least a handful of individuals in our city who exhibit this behavior.

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I believe if stalking was a reportable crime police records would now show a pattern of conduct involving individuals committing this type of repeated harassment.

For these reasons I ask you to consider my testimony and vote in the affirmative for Senate Bill No. 665, moving it to the full Senate.

Thank you.

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TESTIMONY OF
DEPUTY ATTORNEY GENERAL EDWIN A. VAN PETTEN
OFFICE OF THE ATTORNEY GENERAL
BEFORE THE SENATE JUDICIARY SUBCOMMITTEE
MARCH 18, 1992
RE: SENATE BILL 665

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of Attorney General Bob Stephan, I appear in support of Senate Bill 665. I understand that you have previously heard from a Douglas County victim who for 10 years has been subjected to harassment which has continually interrupted her life and even caused a divorce. That testimony shows the need for this type of law. I do feel that some amendments are necessary for the measure, however.

I have prepared a balloon version of Senate Bill 665, which is attached to my testimony. I think these changes will make the bill more compatible with existing Kansas criminal law. I will briefly explain my suggestions:

1. The last portion of Section 1.(a) addresses a situation that can be charged as a violation of K.S.A. 21-3419, a Terroristic Threat, which is a class E felony. This language, being more specific, would necessitate the

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prosecution of the lesser crime, in situations which fit that definition.

2. The amendment to 1.(c) addresses the language change due to the amending of (a) and upgrades the second violation to felony status. If second and subsequent violations are only class A misdemeanors as is the first violation, there is no need for this additional language, as the offender could be prosecuted under subsection (a) again.

3. Striking the last phrase in (d)(1) will make the proof of the element of harassment clearer for the trier of fact, and make the standard fit within the "reasonable man" realm of criminal law which our finders of fact are instructed to follow.

4. Subsection (d)(3) would not be necessary because of the prior amendment.

You will also note by the prepared balloon that I am requesting that you amend Senate Bill 665 by amending in the provisions of Senate Bill 595, which addresses Construction Fund Fraud; and Senate Bill 294, which extends the statute of limitations for criminal acts.

Senate Bill 595 addresses a criminal act which has fallen through the cracks of our criminal justice system previously. We believe it is needed now due to changes made in recent years to protect the innocent consumers, which have somewhat restricted suppliers and contractors in their ability to obtain lien protection. The provision will provide assurance

that contractors will satisfy obligations from the construction funds, and places the proper burden on the prosecution to prove the intent to defraud, as is done with any crime involving a fraudulent act by the perpetrator, and as defined by K.S.A. 21-3110(9). This cause of action can only be brought after payment to the contractor of all funds due.

This bill was requested this year by the Attorney General's Consumer Protection Advisory Council, and it is my understanding that it is supported by the District Attorney's offices that have a division of Consumer Fraud. When the hearing on this bill was tentatively scheduled earlier, we also had two consumers who planned to testify to explain why such a bill is necessary.

I would ask for one change in this amendment. On page 2 lines 13 and 15, change $5,000 to $1,000. This would reduce the threshold for a felony violation. This change is recommended by prosecutors who deal with this issue on a daily basis.

As you can readily see by a review of Senate Bill 294, it presents a much needed provision to extend the statute of limitations on criminal prosecution to 5 years.

We are no longer afforded the luxury of simplistic crimes that are readily discoverable, and once discovered, easily investigated and presented for prosecution.

As you have seen in this last year many white collar crimes require years of investigation before the nature of the crime is understood. Then the evidence must be assembled to insure a conviction.

With the development of scientific investigations, evidence is credible for a much longer period of time, and can easily be the basis for prosecution within the parameters of this bill.

You can give law enforcement a tool which they desperately need to combat all crimes, and allow us to utilize the tools we now have at our disposal by passing these provisions.

I ask for your support of this bill with these amendments.

Session of 1992

SENATE BILL No. 665

By Senators Brady, McClure, Petty and Winter

2-12

8 AN ACT concerning crimes and punishments; creating the crime of
9 stalking.
10
11 *Be it enacted by the Legislature of the State of Kansas:*
12 Section 1. (a) Stalking is the willful, malicious and repeated fol-
13 lowing or harassment of another person ~~and making a credible threat~~
14 ~~with the intent to place that person in reasonable fear of death or~~
15 ~~great bodily injury~~.
16 Stalking is a class A misdemeanor.
17 (b) Any person who violates subsection (a) when there is a tem-
18 porary restraining order or an injunction, or both, in effect prohib-
19 iting the behavior described in subsection (a) against the same
20 person, is guilty of a class A misdemeanor.
21 (c) Any person who has a second or subsequent conviction oc-
22 curring against such person, within seven years of a prior conviction
23 under subsection (a) involving the same victim, [handwritten insertion: is guilty of a class D felony] ~~and involving an act~~
24 ~~of violence or a credible threat of violence, as defined in subsection~~
25 ~~(d), is guilty of a class A misdemeanor~~.
26 (d) For the purposes of this section:
27 (1) "Harassment" means a knowing and willful course of conduct
28 directed at a specific person which seriously alarms, annoys, or ha-
29 rasses the person, and which serves no legitimate purpose. The
30 course of conduct must be such as would cause a reasonable person
31 to suffer substantial emotional distress. ~~and must actually cause sub-~~
32 ~~stantial emotional distress to the person.~~
33 (2) "Course of conduct" means a pattern of conduct composed of
34 a series of acts over a period of time, however short, evidencing a
35 continuity of purpose. Constitutionally protected activity is not in-
36 cluded within the meaning of "course of conduct".
37 ~~(3) "A credible threat" means a threat made with the intent and~~
38 ~~the apparent ability to carry out the threat so as to cause the person~~
39 ~~who is the target of the threat to reasonably fear for such person's~~
40 ~~safety. The threat must be against the life of, or a threat to cause~~
41 ~~great bodily injury to, a person.~~
42 (e) This section shall not apply to conduct which occurs during
43 labor picketing.

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1 Sec. 2. ~~This act shall take effect and be in force from and after~~
2 ~~its publication in the statute book.~~ S.B. 595

Sec. 3. S.B. 294